



TC 08311A/V

VAT – Flat Rate Scheme - Whether operated correctly by Appellant – No – Appeal allowed in part

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2019/03864

BETWEEN

SWISS DAWN CONSULTANTS LIMITED

Appellant

-and-

**THE COMMISSIONERS FOR
HER MAJESTY'S REVENUE AND CUSTOMS**

Respondents

**TRIBUNAL: JUDGE JOHN BROOKS
PATRICIA GORDON**

The hearing took place on 28 October 2021. With the consent of the parties, the form of the hearing was V (video) using the Tribunal video platform. A face to face hearing was not held because of the coronavirus restrictions in place at the time the hearing was listed.

Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

Vanessa Oakes, Director of Swiss Dawn Consultants Limited, with her husband Stephen Jones for the Appellant

Thomas Brown litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. This appeal, by Swiss Dawn Consultants Limited (the “Company”), concerns the operation of the VAT Flat Rate Scheme (“FRS”).
2. Under the FRS, rather than record the output VAT on sales and input VAT on purchases to determine the VAT due to HM Revenue and Customs (“HMRC”), a person who is registered for VAT with a turnover up to £150,000 may, if authorised to do so by HMRC, elect to calculate their VAT liability under the FRS by applying an “appropriate percentage” (dependent upon the trade sector of the business) to their “relevant turnover”.
3. A person’s “relevant turnover” is defined by s 26B(2)(c) Value Added Tax Act 1994 (“VATA”), as the total of the value of their taxable and exempt supplies “together with the VAT chargeable on them”, ie their gross turnover.
4. The “appropriate percentage” is determined by reference to the category of business carried on as stated in the table of categories of businesses and appropriate percentages contained in Regulation 55K of the Value Added Tax Regulations 1995. It is reduced by 1% (under Regulation 55JB) for the first year following the effective date of VAT registration of a business. For example, under the “accountancy or book-keeping” category of business the appropriate percentage is 14.5%. However, during the first year following registration for VAT, an accountant operating the FRS would apply an appropriate percentage of 13.5% to calculate the firm’s liability to VAT.
5. Also, subject to limited exceptions concerning the relevant purchase of “capital expenditure goods”, ie goods costing more than £2,000 including VAT (see Regulation 55E), there is no entitlement to credit for input VAT. This is because the appropriate percentage is calculated to represent the net VAT due to HMRC.

FACTS

6. The Company was registered for VAT with effect from 5 August 2014. It was also authorised by HMRC to operate the FRS from that date. Its business category was ‘Management Consultancy’ and the appropriate percentage was 14%, reduced to 13% for its first year of trading.
7. Ms Oakes, on behalf of the Company, wrote to HMRC. The letter which was received on 8 June 2015 (the “8 June 2015 Letter”) notified HMRC that:
 - (1) the 08/14 and 04/15 VAT returns had “incorrectly” overstated the VAT due; and
 - (2) the input tax claims, made in these periods but which were not included in the amendments were withdrawn (albeit implicitly).

Although the letter also requested that HMRC update the Company’s online VAT records HMRC did not respond to the 8 June 2015 Letter but automatically processed the amendments without any further examination.

8. On 6 December 2017 HMRC wrote to the Company stating that:

“Every year we check a number of VAT returns to make sure that they are correct and that our customers are paying the right amount of tax. We are writing to tell you that we will be checking your VAT returns for the periods [10/14 to 01/17]”

The letter continued:

“We will be checking that you are operating the VAT Flat Rate Scheme correctly. The rules for the scheme are set out in VAT Public Notice 733 ‘Flat Rate Scheme for Small Businesses’.

We will be checking that you:

- are using the correct flat rate percentage for your trade class.
- have correctly claimed the 1% reduction allowed for the first year of registration.
- have evidence to support any input tax claimed, and that the input tax is allowable under the Flat Rate Scheme.
- have included your total sales including VAT (gross sales) on Box 6 of your VAT return.
- have correctly calculated the amount the business has spent on relevant goods including VAT.
- have calculated the VAT due using the gross sales figure.
- are eligible to use the Flat Rate Scheme.
- are treating acquisitions tax and despatches correctly, if you buy goods from, or sell goods to, other Member States of the EU.
- are correctly using the cash based method.”

9. On 10 January 2018, in the absence of any response to its letter of 6 December 2017, HMRC wrote to the Company again, this time stating that, on the information in its possession, it considered that there were errors in the Company’s VAT returns and that an additional £6,770 VAT was due.

10. The Company replied on 22 January 2018 with a summary of invoices and financial information for the VAT periods concerned.

11. Following further correspondence between the Company and HMRC it transpired that Ms Oakes had calculated the VAT due to HMRC from the Company by applying the appropriate percentage to its net rather than gross turnover.

12. Also, during VAT periods 01/15 and 04/15 input tax had been claimed in respect of two invoices that were not for capital expenditure goods. However, as noted above (in paragraph 7), the 04/15 input tax claim was withdrawn by the 8 June 2015 letter from the Company to HMRC.

13. On 3 December 2018 HMRC issued a VAT “best judgment” assessment, under s 73 of VATA, in the total sum of £8,474 for the accounting periods and in the amounts set out in the table appended to this decision.

14. The assessment was upheld on 10 May 2019 following a review.

15. On 27 May 2019 the Company appealed to the Tribunal.

DISCUSSION AND CONCLUSION

16. HMRC, which was represented by Mr Thomas Brown a litigator from its Solicitor’s Office, contends that the Company failed to operate the Flat Rate Scheme (“FRS”) correctly in that it applied the relevant trade sector percentage to its net rather than gross sales and wrongly claimed input tax in 01/15. However, it was accepted that the 04/15 input tax claim was implicitly withdrawn by the 8 June 2015 Letter and that the assessment should be reduced accordingly.

17. Ms Vanessa Oakes told us that she had done everything she could to ensure that the Company correctly operated the FRS and, while she accepts that it applied the appropriate

percentage to its net rather than gross turnover, contends that HMRC should have been more vigilant in checking the returns and that its advice and guidance should have been clearer.

18. In the Company's Notice of Appeal she also explained that, on a personal level, she has found dealing with HMRC and the appeal process to have been a "massive distraction" and "very upsetting and distressing" and considers it "certainly contributes" to her inability to obtain employment.

19. Although HMRC, in our view rightly, accept that there has been "an imperfect customer service causing some stress" to Ms Oakes, as explained at the hearing, this Tribunal, the Tax Chamber of the First-tier Tribunal, does not have jurisdiction to consider the conduct of HMRC (see *HMRC v Hok Ltd* [2013] STC 225 at [56]).

20. Accordingly, we have restricted our consideration to those matters on which the Tribunal does have jurisdiction in relation to this case, an appeal against a 'best judgment' assessment. As Lord Justice Carnwath (as he then was) observed at [69] in *Khan v HMRC* [2016] EWCA Civ 89):

"The position on an appeal against a 'best of judgment' assessment is well-established. The burden lies on the taxpayer to establish the correct amount of tax due"

21. It is therefore for the Company to establish that it had paid the correct amount of VAT due to HMRC. However, we have come to the conclusion that it did not. This is because the Company did not operate the FRS correctly in that it:

(1) applied the appropriate percentage to its net rather than its gross turnover contrary to s 28B VATA which clearly provides that the "relevant turnover" to which the appropriate percentage is to be applied must include VAT, ie it is the gross and not the net turnover to which the appropriate percentage is applied; and

(2) claimed input tax. Although the claim for input tax for 04/15 was implicitly withdrawn by the 8 June 2015 Letter, the input tax claimed by the Company during its 01/15 accounting period was not and, given the amount claimed, £24, it cannot have been incurred in respect of a relevant purchase of capital expenditure goods.

22. It therefore follows that, other than a reduction of the assessment by £39 to take account of the withdrawal of the input tax claim for 04/15, we have no alternative but to confirm the assessment, albeit in the amended sum of £8,435 and, to this extent only, allow the appeal in part.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

23. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

**JOHN BROOKS
TRIBUNAL JUDGE**

Release date: 01 NOVEMBER 2021

APPENDIX

VAT Period	Correct FRS %	Gross Sales £	Sales VAT due (A) £	Sales VAT declared (B) £	Additional sales VAT to be paid £	Disallowed Input tax (C) £	Total due to HMRC (A) - (B) + (C)
01/15						24.00	24.00
04/15	13	60,444.52	7,857.79	6,548.09	1,309.70	39.00	1,348.00
07/15	13	20,165.00	2,621.45	2,184.51	436.94		436.00
10/15 ¹		44,439.00	6,078.98	4,814.23	1,264.75		1,264.00
01/16	14	55,935.88	7,831.02	5,397.69	2,433.33		2,433.00
04/16	14	22,353.00	3,129.42	2,607.79	521.63		521.00
07/16	14	38,734.00	5,422.76	4,519.01	903.75		903.00
10/16	14	28,795.00	4,031.30	3,359.52	671.78		671.00
01/17	14	37,473.00	5,246.22	4,371.84	874.38		874.00
						TOTAL	8,474.00

¹ The 10/15 accounting period spanned the end of first year of the Company's operation and therefore different FRS appropriate percentages applied to the gross sales of £44,438 during that period. The gross sales from 01/08/15 to 31/08/15 were £14,248 and the appropriate percentage 13% with liability to VAT being £1,852.25. The gross sale from 01/09/15 to 31/10/15 were £30,191, the appropriate percentage was 14% and therefore a VAT liability of £4,226.74.